

HAWAII ADMINISTRATIVE RULES

TITLE 12 DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 4

ENFORCEMENT DIVISION

CHAPTER 26

LIE DETECTOR TESTS

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SUBCHAPTER 1

GENERAL

§12-26-1 Definitions. As used in this chapter:

"Attorney general" means the state attorney general or any deputy.

"Complainant" means the individual who has filed a complaint.

"Complaint" means a verified written statement filed with the department pursuant to this chapter alleging an unlawful practice within the meaning of the statute and this chapter.

"Department" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Director" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Employee" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Employer" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Examinee" means the individual taking the lie detector test.

"Examiner" means the person administering the lie detector test.

"Holiday" means any day designated as such pursuant to section 8-1, Hawaii Revised Statutes.

"Investigating officer" means the person designated by the department to conduct an investigation of a complaint.

"Lie detector test" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Person" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Prospective employee" shall be as defined in section 378-21.1, Hawaii Revised Statutes.

"Respondent" means any person, employer, employment agency, or examiner against whom a complaint is filed alleging an unlawful practice within the meaning of the statute.

"Statute" means part II of Chapter 378, Hawaii Revised Statutes.

"Test" means lie detector test.

"Verified" means sworn to or affirmed before a notary public or other person authorized by the director to administer oaths. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-27)

§12-26-2 Computation of time. The time in which any act provided by this chapter is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday and the it is also excluded. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-27)

§12-26-3 General inquiry. (a) Whenever it appears to the department that an unlawful practice under the statute may have been committed, the department may make an inquiry without the filing of a complaint.

(b) The department may file a complaint whenever the inquiry has revealed a violation of the statute.

(c) The information gathered in the course of an inquiry which occurred prior to the filing of a complaint may be used in processing the complaint. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-4 Filing of complaint. (a) The complainant may request assistance in drafting and filing complaints at the department's enforcement division in Honolulu, and at the department's district offices on Hawaii, Maui, and Kauai.

(b) The complaint shall be in writing and, where feasible, upon forms furnished by the department. The complaint shall be signed and verified.

(c) The complaint shall be filed by personal delivery or by mail, addressed to the department's Enforcement Division in Honolulu, or to any of the department's district offices on Hawaii, Maui, and Kauai. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-5 Contents of complaint. Each complaint shall contain the following:

- (1) The full name, social security number, address, and telephone number (if any) of the complainant;
- (2) The full name, address, and telephone number (if any, and if known) of the respondent or respondents;
- (3) A plain and concise statement of the facts constituting the alleged unlawful practice;
- (4) The date or dates on which the alleged unlawful practice occurred; and
- (5) Other information as required by the department. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-6 Time for filing complaint. The complaint shall be deemed to have been filed on the date the complaint was received by one of the department's offices listed in section 12-26-4(c). [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-7 Service of complaint. The department shall serve a copy of the complaint on the respondent by mail or by personal delivery not later than ten days after a complaint is filed with the department. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-8 Amendment of complaint. (a) Before commencement of litigation in circuit court, the department may permit the complainant to amend a complaint to:

- (1) Cure technical defects or omissions, including, but not

limited to, failure to verify the complaint; or

- (2) Clarify or amplify allegations, or both.

(b) Amendments described in subsection (a) and amendments alleging additional acts which constitute unlawful practices related to or arising out of the subject matter of the original complaint shall relate back to the original filing date.

(c) The department shall serve a copy of the amended complaint on the respondent by mail or by personal delivery not later than ten days after it is filed with the department. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-9 Withdrawal of complaint. (a) Upon request of the complainant, a complaint, or any part thereof, may be withdrawn only if:

- (1) The written consent of the investigating officer is obtained, where the request for withdrawal is made prior to the referral of the complaint by the department to the attorney general for the institution of civil action; or
- (2) The written consent of the attorney general is obtained, where the request for withdrawal is made after the complaint has been referred to the attorney general for the institution of civil action.

(b) When requesting withdrawal of a complaint, the complainant shall:

- (1) Submit the request in writing;
- (2) Set forth fully the reasons for the request;
- (3) Sign the request; and
- (4) Have the request verified.

(c) The department shall notify the respondent of the withdrawal. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-24)

§12-26-10 Dismissal of complaint. (a) The investigating officer shall dismiss the complaint if:

- (1) It is determined that the department does not have jurisdiction over the complaint;
- (2) It is determined after investigation that reasonable cause does not exist to believe that the alleged unlawful practice has been committed;
- (3) The complainant cannot be located; provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within thirty days to a notice sent by the department to the complainant's last known address;
- (4) The respondent has made a predetermination settlement offer as described in section 12-26-12, which is in

writing and specific in its terms, and the complainant refuses to accept the offer; provided that the offer, as determined by the department, would afford full relief for the harm alleged by the complainant and the complainant fails to accept the offer not later than thirty days after actual notice of the offer; or

- (5) The complainant has failed to cooperate fully in the investigation or conciliation of a complaint by:
 - (A) Failing or refusing to provide the department with requested information;
 - (B) Failing or refusing to appear or to be available for interviews or conferences as the department deems necessary; or
 - (C) Otherwise failing or refusing to cooperate to the extent that the department is unable to resolve the complaint; provided that after due notice of the department's intent to dismiss the complaint, the complainant has had thirty days in which to respond.

(b) In the event of any dismissal of a complaint:

- (1) The complainant shall be notified of:
 - (A) The reasons for the dismissal; and
 - (B) The right to sue;
- (2) The respondent shall be notified in writing of the dismissal and the reasons therefor.

(c) The dismissal of a complaint may be reconsidered by the department on its own initiative at any time not later than ninety days after the date of the mailing of the notice of dismissal. Written notice of the reconsideration shall be provided by the department to all the parties. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-25)

§12-26-11 Investigation and fact-finding conference. (a) After the filing of a complaint, the investigating officer shall investigate the charges contained in the complaint.

(b) As part of its investigation, the department may require all parties to attend a fact-finding conference.

(c) The fact-finding conference is primarily for the purposes of:

- (1) Ascertaining the positions of the parties;
 - (2) Identifying the issues in dispute;
 - (3) Resolving those issues that can be resolved;
 - (4) Obtaining evidence; and
 - (5) Determining the likelihood of a settlement.
- [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-25)

§12-26-12 Predetermination settlement. (a) At any time after the filing of a complaint, but prior to the issuance of a determination, the investigating officer may encourage the parties to resolve the complaint through a predetermination settlement.

(b) If the complainant and the respondent agree to the terms of settlement, the settlement shall be reduced to writing, and be signed by the parties and the investigating officer. If approved by the department, the case will be closed without a finding on the merits of the complaint and a copy of the final predetermination settlement shall be sent to the complainant and the respondent.

(c) If a predetermination settlement is achieved, the terms thereof shall not attribute fault to any of the parties involved.

(d) The department shall not subject either party to prejudice as a result of participating or refusing to participate in a predetermination settlement attempt.

(e) Participation by the respondent in a predetermination settlement attempt will not be construed as evidence of a violation of the statute or a waiver of the right to a departmental determination on the issues raised by the complaint if a settlement cannot be achieved.

(f) A predetermination settlement shall not affect the processing of any other complaint, including, but not limited to, a department initiated complaint or a complaint in which the allegations are like or related to the individual allegations settled. (Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-25)

§12-26-13 Conference, conciliation, and persuasion. (a) When the investigating officer finds reasonable cause to believe that an unlawful practice has occurred or is occurring, the department shall notify the parties in writing of its determination, including the amount of the fine.

(b) The investigating officer shall immediately endeavor to eliminate the unlawful practice by conference, conciliation, and persuasion.

(c) The investigating officer may require any or all parties to attend a conciliation conference for the purpose of attempting to resolve the matter informally. The parties shall be notified of time and place of the conciliation conference.

(d) Should a respondent fail or refuse to confer and otherwise cooperate with the department or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the department shall terminate its efforts to conciliate the dispute. In that event, the department shall send the respondent a demand letter as provided in section 12-26-15. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-25)

§12-26-14 Conciliation agreement. (a) In attempting to conciliate a case after a determination of reasonable cause has been made, the investigating officer shall endeavor to achieve a resolution of all violations found and to obtain an agreement that the respondent will eliminate the unlawful practice and provide appropriate relief.

(b) Where conciliation efforts are successful, the terms of the conciliation shall be reduced to a written agreement which shall be signed by the parties and the investigating officer; provided that in the judgment of the investigating officer, the agreement provides full relief to the complainant, appropriate affirmative action, and payment of the fine. A copy of the signed conciliation agreement shall be sent to the parties.

(c) Where the complainant has refused to accept a proposed conciliation agreement, the department and the respondent may enter into a conciliation agreement to which the complainant is not a party if the agreement does not affect the complainant's rights and if, in the department's opinion, the agreement provides for:

- (1) A just resolution of all violations found;
- (2) The elimination of the unlawful practice;
- (3) Appropriate affirmative action; and
- (4) Payment of the fine.

In that event, the department shall close the case without the complainant's consent and issue a notice of right-to-sue.

(d) The department may refuse to approve a conciliation agreement, even though the individual parties have agreed on the proposed terms, if the department believes the remedies outlined in the agreement are inadequate to eliminate the unlawful practice complained of or fail to provide appropriate affirmative action. In that event, the case may be closed, provided respondent has paid the fine, as having been settled on terms not approved by the department, and the department need not take any action to enforce the agreement if its terms are violated. (Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §§378-25, 378-28)

§12-26-15 Demand letter. (a) If the department has been unable to eliminate the alleged unlawful practice through conference, conciliation, and persuasion, and it appears to the department that further efforts at conciliation would be futile or non-productive, the department shall terminate its conciliation efforts.

(b) The department, upon termination of conciliation efforts, shall send the respondent:

- (1) A letter by certified mail, return receipt requested, demanding that the respondent:
 - (A) Cease and desist from engaging in the alleged

unlawful practice;

- (B) Take appropriate remedial action; and
- (C) Pay the assessed fine; and

(2) A proposed conciliation agreement, containing a provision requiring the respondent to report on the manner of compliance with the proposed conciliation agreement.

(c) Not later than fifteen days after receipt of the demand letter and the proposed conciliation agreement, the respondent shall either:

- (1) Sign the conciliation agreement as written and return it to the departments or
- (2) Request, in writing, the continuation of conciliation efforts, stating in the request the reasons why conciliation should continue. The department shall either grant or deny the request.

(d) If the respondent does not either sign or return the enclosed conciliation agreement or request the continuation of conciliation efforts not later than fifteen days after receiving the demand letter, or if the respondent requests the continuation of conciliation efforts, yet no conciliation agreement can subsequently be secured, the department shall notify the complainant. Notification of the complainant shall include a statement that the complainant may request the department to proceed in court on the complainant's behalf pursuant to section 378-25, Hawaii Revised Statutes, by signing and returning the assignment form enclosed with the notification not later than thirty days after the mailing of the notice. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §§378-25, 378-28)

§12-26-16 Civil action. (a) Upon receipt of the complainant's signed statement requesting the department to commence legal action on the complainant's behalf or the respondent's failure to pay the fine assessed by the department, the case shall be referred to the attorney general.

(b) If the attorney general decides to accept the case, for litigation, a civil action shall be commenced, in circuit court seeking appropriate relief.

(c) If the case has been accepted by the attorney general for litigation, the parties shall not enter into a conciliation agreement without the approval of the attorney general.

(d) The director may join various complainants in one cause of action in accordance with the Hawaii Rules of Civil Procedure.

(e) If the attorney general decides not to bring a civil action against the respondent, the department shall so notify the complainant and issue a notice of right-to-sue. [Eff. 3/21/86] (Auth:

SUBCHAPTER 2

PRACTICES RELATING TO LIE DETECTOR TESTS

§12-26-21 Pre-employment practices. An employer shall not incorporate any questions regarding the taking of a lie detector test as part of an application form. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-22.1)

§12-26-22 Notification. (a) The employer shall inform the employee or prospective employee orally and in writing that the test is voluntary and the refusal to submit will not result in the termination of the employee or will not jeopardize the prospective employee's chance of a job.

(b) The employer shall give the required written notification as follows:

- (1) Provide a copy to the employee or prospective employee; and
- (2) Have the employee or prospective employee sign a copy to acknowledge receipt of notice and maintain that copy on file for not less than one year. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS 378-22.1)

12-26-23 Other unlawful practices. (a) An employer shall not ask an employee or prospective employee if he or she is willing to have a relative submit to a lie detector test, unless there is a substantial relationship to the issues under investigation.

(b) No employer shall administer a lie detector test on an employee or prospective employee without the prior permission and knowledge of the examinee. [Eff. 3/21/86] (Auth: HRS §378-27) HRS §§378-22.1, 378-27)

§12-26-24 Record keeping requirements. (a) Any personnel or employment record made or kept by the employer shall be preserved by the employer for not less than one year from the date of the making of the record or the personnel action involved. The records shall include but not be limited to forms, application, and records having to do with:

- (1) Hiring;
- (2) Promotion;
- (3) Demotion;
- (4) Layoff or termination;
- (5) Rates of pay or other terms of compensation;

- (6) Selection for training or apprenticeship;
- (7) Employment referrals; and
- (8) The taking of a lie detector test, including but not limited to:
 - (A) Employee's or prospective employee's acknowledgment of being informed of rights under the statute;
 - (B) Correspondence; and
 - (C) Test results and general reports.
- (b) If the employer terminates an employee, the personnel records of the individual terminated shall be kept for not less than one year from the date of termination.
- (c) Where a complaint has been filed or civil action has been brought against a respondent under the statute, the respondent shall preserve all personnel records relevant to the complaint or action until final disposition of the complaint or action.
 - (1) Personnel records relevant to the complaint include:
 - (A) Personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant; and
 - (B) Application forms completed by the complainant and by all other candidates for the same position as that for which the complainant applied and was rejected.
 - (2) "Final disposition of the complaint or action" means:
 - (A) The date of expiration of the statutory period within which the complainant may bring an action in circuit court; or
 - (B) Where civil action is brought against the respondent by the complainant, the date on which the litigation is terminated by entry of a final order and time for filing a notice of appeal has expired and no appeal has been filed. [Eff. 3/21/86] (Auth: HRS §378-27) (Imp: HRS §378-26)